IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10/03/2004

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

SECOND APPEAL No.849 of 1993

Mohammed Mohideen Lebbai .. Appellant

-Vs-

1. Mohammed Asan Tharaganar (died)
2. Asiyal
3. M.Abdul Khader
4. Jamal Mohideen
5. Meeran
6. Ali
7. Sulaiman
8. Rasidal
9. Mohideen Pathumal
10.Habida
(RR2 to 10 brought on record
as LRs of the deceased 1st
respondent vide order in CMP
5097/97 dated 12.6.97) .. Respondents

This second appeal is preferred under Sec.100 of the Code of Civil Procedure against the judgment and decree made in A.S.No.108 of 1992, dated 6.4.1993 by the Subordinate Judge, Ambasamudram, reversing the judgment and decree made in O.S.No.690/83 dated 31.1.90 by the Additional District Munsif, Ambasamudram.

!For Appellant : Mr.K.Chandrasekaran

^For Respondents : Mr.A.Sankara Subramanian
for RR2 to 10
R1- died

:JUDGMENT

This second appeal has arisen from the judgment of the learned Subordinate Judge, Ambasamudram, made in A.S.No.108/92, whereby the judgment of the trial Court in a suit for permanent injunction granting the relief, was reversed.

2. The following facts are noticed in the pleadings of the parties:
The suit property and other properties belonged ancestrally to the plaintiff's and his brother's families, and they have been enjoying the same

solely. There was a registered partition between the heirs of K.K.Umar Lebbai on 24.1.1949, wherein the suit property among others was allotted to the plaintiff and other heirs through the second wife of Umar Lebbai, as item 27. From that time onwards, the plaintiff was in possession and enjoyment of the same. The defendant has no right, possession or interest in the suit property. The property on the west of the suit property belonged to the defendant's predecessorin-title. In the said partition deed, the intervening wall is shown as a common wall. On the east of the wall, the defendant has no right, title or interest. This was also admitted by the defendant's predecessor-in-title namely Nalla Mohideen Lebbai in the rectification deed dated 22.6.1938. Again on 15.12.1943, the grandfather of the defendant namely Umar Lebbai had executed a gift deed, wherein he admitted the western wall of the suit property as a common wall. Thus, the defendant is not entitled to any right over the same. There was a Ghadi Kana in the plaint Schedule property. The plaintiff was paying the kist. The defendant was trying to interfere with the plaintiff's peaceful possession and enjoyment of the suit property. Hence, the suit.

3. The suit was resisted by the defendant stating that the plaintiff was entitled to a space, measuring 2 + C.C. east west; that his brother purchased the same from one Viswa Nalla Muhaideen Lebbai under a registered sale deed dated 20.2.1943; that the plaintiff can claim only this extent; that the partition deed was a self serving document, and it cannot confer any right upon the plaintiff; that the recitals in the partition deed will not be binding upon the defendant; that the defendant was not aware of the rectification deed dated 22.6.1938; that the rectification deed was a fraudulent one; that the plaintiff and his brother had fraudulently introduced boundary recitals in the documents; that no wall was ever in existence ; that the plaintiff made encroachment into the defendant's site; that the suit property originally belonged to Ahamed Meethi Lebbai, and after his death, his two sons Kader Muhaideen Lebbai and Abu Bucker Lebbai and his daughter Saral Ammal; that the daughter executed a sale deed on 17.5.1926 in favour of the defendant's grandfather Umar Lebbai and defendant's mother Muhaideen Bathummal, conveying her 3/8th share of the properties; that the defendant's grandfather purchased an extent measuring 5 C.C. east west and 55 C.C. north south from Nalla Muhaideen Lebbai on 1.6.1938, and thus, Saral Ammal, Umar Lebbai and Muhaideen Bathummal became entitled to 9.5 C.C. east west and 55 C.C. north south; that except 2 + C.C., the remaining extent in the suit property belonged to the defendant; that Naina Mohammed Muhaideen Lebbai, the maternal uncle of the defendant's mother, was managing the properties belonging to the defendant and his brothers; that taking advantage of the close relationship, he has introduced false recitals in the documents, and hence, the suit was to be dismissed.

4. On the above pleadings, the trial Court framed the necessary issues, tried the suit and decreed the same. Aggrieved, the defendant took it on appeal, wherein the finding of the trial Court was reversed, and the suit was dismissed by the lower appellate Court. Hence, the plaintiff has brought forth this second appeal.

5. At the time of admission, the following substantial questions of law were formulated by this Court:

(1) Whether the lower appellate Court is right in reversing the decree and dismissing the suit on the ground that the suit is filed for permanent

injunction simplicitor without a prayer for declaration of the title when such a plea has not been raised in the written statement and more so when the trial Court has decided the question of title and has given time for payment of additional Court fee for the relief of declaration?

(2) Whether the lower appellate Court erred in reversing the decree on the ground that the non-appointment of Commissioner when no material was before it to come to the conclusion that by such nonappointment, the case of the plaintiff has not been proved while on the other hand the defendant himself has let in evidence relying upon the plan filed by the plaintiff?

6. This Court heard the learned Counsel for the appellant and also the learned Counsel for the respondents 2 to 10 on those contentions.

7. While the plaintiff originally sought for a permanent injunction that the defendant should be restrained from interfering with his peaceful possession and enjoyment of the suit property, fully described in the Schedule, annexed to the plaint, a relief of declaration was also included. A specific issue was also framed by the trial Court, and the parties were also given opportunity to put forth their evidence on the issues including the one for declaration. The comment made by the first appellate Court that the plaintiff had not made an attempt to seek a prayer for declaration in respect of the suit property was one without proper looking into the case papers. Hence, the said comment is not warranted for.

8. The specific case of the plaintiff before the trial Court was that the suit property and other properties belonged ancestrally to the families of the plaintiff and his brother; that they were enjoying the same; that there was a registered partition on 24.1.1949 as evidenced by Ex.A1, wherein the suit property is shown as 27th item; that in that partition, the suit property was allotted to the plaintiff; that he has been in enjoyment of the same all along; that the defendant, who has no manner of right, was making a false claim and attempted to infringe over the rights of the plaintiff, and hence, there arose a necessity for filing the suit. The defence plea was that the plaintiff was entitled only to 2 + Carpenter Cubic (jr;R KHk;) and not, as mentioned in the plaint, to an extent of 6 Carpenter Cubic (jr;R KHk;) east west; that all the documents filed by both sides would clearly indicate that the plaintiff was not entitled to the entire property as sought for in the plaint, and hence, his claim was to be rejected. A careful consideration of the documentary evidence would clearly reveal that the plaintiff was entitled to the property as asked for. It is not in dispute that the plaintiff and his brother entered into a partition in respect of the family properties on 24.1.1949 under Ex.A1, wherein the suit property was shown as 27th item. It is also not in controversy that the plaintiff was put in possession of the property, which was allotted to him in the partition, and has been enjoying so. According to the plaintiff, Naina Muhaideen Lebbai, the brother of the plaintiff, purchased the property from Viswa Nalla Muhaideen Lebbai, as evidenced by Ex.B5 dated 20.2.1943. That apart, it was added by the plaintiff that he was put in possession of the property by his brother, and he was enjoying so. A perusal of both the documents would clearly indicate that there has been a common wall dividing the property of the plaintiff and the adjacent properties.

9. The defendant has claimed title to his adjacent property through a gift deed marked as Ex.B4 dated 15.12.1943, wherein it has been clearly referred to as "bghJ RtUf;F nkw;F". The settlor under the same gift deed,

which was marked as Ex.A6 on the side of the plaintiff, got the property under Ex.B1 sale deed dated 1.6.1938, wherein a mistake crept in while stating one of the boundaries as "bghJ RtUf;F fpHf; F", instead of "bghJ RtUf;F nkw;F". When the mistake was found, a rectification deed was executed under Ex.A5 on 22.6.1938. The subject matter of Ex.B1 dated 1.6.1938, which was subsequently rectified under Ex.A5, was actually given by way of gift to the defendant on 15.12.1 943 under Ex.B4. This would clearly indicate that there was a common wall dividing the properties. Above all, there was a candid admission made by D.W.1 in the box that the plaintiff's brother's property was situated on the east of the common wall. He has also further added that from 1946 onwards the plaintiff's brother was enjoying the property on the east of the common wall. In such circumstances, it would be futile on the part of the defendant to contend that there was neither a wall nor a common wall.

10. The trial Court only on consideration and appreciation of the evidence, which was sufficient in the opinion of this Court, has recorded a finding that the plaintiff was entitled to the property, and hence, the relief of declaration and permanent injunction should be granted. But, the first appellate Court on erroneous consideration, has reversed the said finding and set aside the judgment of the trial Court. The first appellate Court has pointed out in its judgment that the plaintiff, despite the denial of title, has not asked for the relief of declaration of title. But, that finding was not correct, since on the pleadings available, an issue whether the plaintiff was entitled to the property in question was framed, and on evidence, the same was discussed and decided by the trial Court in favour of the plaintiff. The second ground, by which the judgment of the trial Court was reversed by the first appellate Court, was that no appointment of Advocate Commissioner was sought for by the plaintiff. This Court is of the firm opinion that the available evidence, in particular the documentary evidence, would be clearly pointing to the title of the plaintiff. In such circumstances, no need arose for seeking an appointment of Advocate Commissioner to inspect the suit property. Therefore, the judgment of the first appellate Court cannot be sustained, and instead, it is a fit case, where the judgment of the trial Court has got to be restored, and the plaintiff has to be granted the relief as asked for.

11. In the result, this second appeal is allowed, setting aside the judgment and decree of the first appellate Court and restoring the judgment and decree of the trial Court. The parties are directed to bear their costs.

Index: yes
Internet: yes

To:
1. The Subordinate Judge
Ambasamudram
2. The Additional District Munsif
Ambasamudram
3. The Record Keeper
V.R. Section
High Court, Madras.

nsv/